STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

35160 JEFFERSON AVENUE, LLC,

Plaintiff,

vs. Case No. 2013-3984-CK

COMMONWEALTH LAND TITLE
INSURANCE COMPANY

Defendant.
_____/

OPINION AND ORDER

Plaintiff has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Defendant has filed a response and requests that the motion be denied.

Facts and Procedural History

On March 19, 2004, Plaintiff purchased real property commonly known as 35160 Jefferson Avenue, Harrison Township, Michigan ("Subject Property") for $1,000,000.00. On the same day, Defendant issued a title insurance policy to Plaintiff in connection with the Subject Property (the "Policy"). Thereafter, Plaintiff submitted several site plans to the Harrison Township Planning Commission ("Commission") and Harrison Township Zoning Board of Appeals ("ZBA") for construction of a multi-unit development on the Subject Property. However, the submissions were denied. In 2006, Plaintiff appealed the ZBA's decision. The appeal was ultimately denied.

In 2010, Plaintiff filed a separate action against the Commission, the ZBA and Ivan and Kimberly Doverspike (the "Doverspikes"), the owners of other property in the same subdivision as the Subject Property (the "First Action"). On February 26, 2010, the Doverspikes filed a

counter-complaint in which they asserted that a deed restriction exists that restricts the Subject Property to a single family residence. The Doverspikes ultimately prevailed in connection with the deed restriction issue. The decision was affirmed by the Michigan Court of Appeals on August 7, 2012.

While that First Action was ongoing, Defendant obtained an appraisal of the Subject Property as of the date Plaintiff discovered the existence of the deed restriction, i.e. the day the counter-complaint was filed. The appraisal provided that the Subject Property was worth $535,000.00 as a multi-family development and $295,000.00 as a single family development. On April 3, 2013, Defendant tendered a check to Plaintiff for the $240,000.00 difference as of the date of the appraisal.

On October 4, 2013, Plaintiff filed its complaint in this matter alleging that Defendant breached the Policy by failing to disclose the deed restriction and that Defendant is liable for additional damages. Specifically, Plaintiff contends that the value of Subject Property should be measured as of the date it obtained the Subject Property rather than the date that the restriction was discovered. Plaintiff also seeks to recover the attorney fees and costs it incurred in developing the Subject Property and litigating the First Action. Plaintiff has since filed the instant motion for partial summary disposition. Defendant has filed a response and requests that the motion be denied.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Graves v Warner Bros,* 253 Mich App 486, 491; 656 NW2d 195 (2002). Under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Id.*

However, the nonmoving party must produce evidence showing a material dispute of fact left for trial in order to survive a motion for summary disposition under this rule. MCR 2.116(G)(4); *Village of Dimondale v Grable,* 240 Mich App 553, 566; 618 NW2d 23 (2000). Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Wayne County Bd of Com'rs v Wayne County Airport Authority*, 253 Mich App 144, 161; 658 NW2d 804 (2002).

Arguments and Analysis

The primary dispute between the parties is the scope of Defendant's liability under the Policy. Specifically, the parties disagree as to when Plaintiff's loss took place. Defendant contends that Plaintiff's loss took place when it became aware of the deed restriction; whereas Plaintiff contends that it incurred a loss at the time it purchased the Subject Property as it purchased property that could only be used for single family use but paid for property that could be used for multi-family use.

The introductory paragraph of the Policy provides:

> Subject to the exclusions from coverage, the exceptions contained in schedule B and the provisions of the conditions and stipulations hereof, [Defendant], a Pennsylvania corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A. against loss or damage, not exceeding the amount of insurance stated in Schedule A, and cost, attorneys' fees and expenses which [Defendant] may become obligated to pay hereunder, sustained or incurred by [Plaintiff] by reason of:
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> ****
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> 2. Any defect in or lien or encumbrance on such title.

It appears undisputed that the issue before the Court has yet to be addressed by the Michigan Court of Appeals or Michigan Supreme Court. The status of this area of law in Michigan was addressed in *JP Morgan Chase Bank, NA v First American Title Ins Co*, 725 F Supp 2d 619 (ED Mich 2010), in which the Court held that "[a] title insurance policy is a contract

of indemnity, not of guaranty and provides for indemnity for actual loss only. *Id., citing Gibraltor Sav v Commonwealth Land Title Ins Co*, 905 F2d 1203, 1205 (8th Cir 1990). In addition, Court in *JP Morgan*, in citing *First Fed Sav and Loan Assoc v Transamerica Title Ins Co*, 19 F3d 528 (10th Cir 1994), held:

> Title insurance is merely a contract to indemnify the insured for any losses incurred as a result of later found defects in title. Title insurance does not insure the value of the subject property; it insures only that the title to such property is unencumbered by unknown liens, easements, and the like which might affect the property's value. In other words, a title insurance policy is not analogous to a warranty of title found in a deed which is breached, if at all, at the time it is made.

Further, with respect to the time a breach occurs, a title insurance policy is breached "only after notice of an alleged defect in title is tendered to the insurer and the insurer fails to cure the defect or obtain title within a reasonable time." *First Fed Sav, supra*, at 531. While not binding, the Court is persuaded by the reasoning and holding set forth in *JP Morgan* and *First Fed*. In this case, as in *JP Morgan*, Defendant could have satisfied its obligations under the Policy by removing the deed restriction within a reasonable time of receiving notice of the encumbrance. While Defendant failed to remove the encumbrance in this matter, Defendant's failure to comply with its duties under the Policy did not occur until it failed to cure the defect or obtain title within a reasonable time of learning of the deed restriction. Had Defendant cured the encumbrance at the time it became aware of it the Subject Property would have been worth $535,000.00 based on the appraisal. However, due to Defendant's breach by failing to remove the deed restriction, the Subject Property's value was reduced to $295,000.00, a $240,000.00 reduction. While Plaintiff disputes the accuracy of the appraisal, it has failed to provide any conflicting evidence with respect to value. Accordingly, the Court is convinced that Defendant's breach resulted in the Subject Property's value being reduced by $240,000.00, the amount that Plaintiff has already recovered from Defendant. For these reasons, the Court is satisfied that the

Policy was breached at the time that the encumbrance was discovered and that Defendant has properly reimbursed Plaintiff for the loss to the Subject Property's value that it incurred as a result of the breach.

With respect to the costs and attorney fees Plaintiff incurred prior to discovering the encumbrance, the Court is convinced that such expenses were not incurred as a result of the deed restriction; rather, the costs and attorney fees were incurred in appealing the decisions of the ZBA and the Commission, neither of which were based on the existence of the deed restriction. Accordingly, the Court is convinced that Plaintiff is not entitled to reimbursement of those expenses under the Policy. With regards to the attorney fees and costs incurred after the deed restriction was discovered, Plaintiff has failed to document what portion of those expenses, if any, were incurred in connection with the attempted removal of the deed restriction. Accordingly, the Court must deny that portion of Plaintiff's motion without prejudice; However, Plaintiff may schedule an evidentiary hearing in order to determine what, if any, fees and costs it is entitled to recover.

Conclusion

For the reasons set forth above, Plaintiff's motion for partial summary disposition is DENIED. Specifically, the Court holds that Plaintiff is entitled to the difference in value between the Subject Property as a multi-family development [$535,000.00] and as a single family development [$295,000.00] as February 26, 2010, the date Plaintiff became aware that the deed restriction existed. Further, the Court finds that Defendant has satisfied that obligation by tendering a check to Plaintiff for $240,000.00. Plaintiff's request for attorney fees and costs incurred prior to discovering the deed restriction is DENIED. Plaintiff's request for attorney fees and costs incurred after discovering the deed restriction is DENIED, WITHOUT PREJUDICE,

as Plaintiff has failed to demonstrate what fees and/or costs it incurred in connection with its attempts to remove the restriction after receiving notice of the deed restriction. Plaintiff may schedule an evidentiary hearing on this issue.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: April 8, 2014

JCF/sr

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